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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

314-678

No. 1026 77

JOHN W. LEWIS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

ODE L. RANKIN,
HERBERT M. WETZEL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1036

JOHN W. LEWIS,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

Petition.

Petitioner, John W. Lewis, the above named defendant a resident of the County of Cook and State of Illinois, now confined in the penitentiary of Illinois, under the judgment of conviction for the crime of manslaughter entered in said cause in the Criminal Court of Cook County, Illinois, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above cause on December 12, 1940 on which a rehearing was denied on February 12, 1941.

Summary Statement of Matter Involved.

The Indictment.

The defendant, John W. Lewis, was indicted on May 31, 1938 by a Grand Jury of Cook County, Illinois on a charge of murder and held without bail. He waived a jury, was tried by the Court and convicted of manslaughter.

The indictment contained two murder counts. The first count charged that on May 19, 1938, in said County, the defendant, feloniously, wilfully and of his malice aforethought made an assault upon the body of one, Carl Edward Hill, and in the peace of the People of the State of Illinois, the defendant wilfully, unlawfully, feloniously and of his malice aforethought did stab, slash and wound said Hill in his body with a certain knife whereby said Hill received mortal wounds from which he, on the same day died and thereby the defendant killed and murdered said Hill in manner and form and by the said means contrary to the statute and against the peace and dignity of the People of the State of Illinois.

The second count is a skeleton count which charges in simple language that on May 19, 1938 the defendant, did unlawfully with malice aforethought by stabbing, kill and murder Carl Edward Hill contrary to the statute and against the peace and dignity of the People of the State of Illinois.

The Trial and Sentence.

On June 1, 1938, the defendant was arraigned and pleaded to the indictment

> "Not guilty in manner and form as charged therein and of this he puts himself upon the county and the said people do the like"

On June 20, 1938, defendant waived trial by jury and the cause was tried by the Court without a jury.

The record then shows:

> Testimony heard in part. Age of the defendant thirty one years. Further testimony heard and the court hearing the arguments of counsel continued the cause till the next day—June 21, 1940.

On June 21, 1938, the Court, (as is recited in the record)

> "being fully advised in the premises doth find the defendant guilty of manslaughter in manner and form as charged in the indictment."

and continued the cause to June 30, 1938.

On June 30, 1938, the court pronounced judgment upon the finding

> "That the said John W. Lewis is guilty of manslaughter in manner and form as charged in the indictment in this cause and the said finding and judgment of guilty"

and sentenced the defendant for the crime of manslaughter.

PROCEEDINGS IN SUPREME COURT OF ILLINOIS.

That defendant sued out a writ of error to the October 1940 term of the Supreme Court of Illinois to review said judgment and said cause was there briefed and argued by counsel for defendant and the State and taken under advisement; that at the December term of the Illinois Supreme Court, on December 12th, 1940, the Supreme Court of Illinois affirmed the judgment so entered in the Criminal Court of Cook County.

That a petition for rehearing was duly filed in the cause and considered by the Court and on February 12, 1941, the Supreme Court of Illinois denied the prayer of said petition for rehearing, making said judgment final, so far as the same may be reviewed by the courts of the State of Illinois.

It was assigned as error in the proceedings to review said judgment in the Supreme Court of Illinois that the

findings and judgment of the Criminal Court of Cook County were in violation of Sections 2, 9, 10 and 14 of Article II of the Constitution of the State of Illinois, in that the said judgment deprived the defendant of his liberty without due process of law; denied him the right to have made known to him the nature and cause of the accusation against him; and deprived him of the right not to be compelled to give evidence against himself.

And it was also assigned as error in the Supreme Court of Illinois that the said finding and judgment of the said Criminal Court of Cook County were in violation of the Fourteenth Amendment of the Constitution of the United States in that they constitute a deprivation of the liberty of the defendant without due process of law; and further assigned as error that the judgment was not responsive to the issues; that the indictment was not sufficient in either count to sustain the finding and judgment of the Criminal Court; and that there were no facts alleged in the indictment upon which the finding and judgment that defendant was guilty of manslaughter could be based.

THE JUDGMENT AND OPINION OF SUPREME COURT OF ILLINOIS.

The Supreme Court of the State of Illinois affirmed the judgment and in its opinion stated the questions upon the record to be that plaintiff in error claims that,

> "he was convicted of an offense with which he was not charged, in violation of the due process clause of the State and Federal Constitutions. He argues that this amounts to exempting the indictment and the proceedings from the constitutional requirement, and is an arbitrary and unreasonable classification in violation of his constitutional rights. The defendant in error (the People's) position is that the charge of murder includes therein a charge of manslaughter. These contentions constitute the decisive issues."

After considering the cause as so presented, the Supreme Court of Illinois held that,

> "The crime of manslaughter is embraced in a charge of murder, and the accused may be found not guilty of murder and convicted of manslaughter. Since the indictment must be held to charge manslaughter, plaintiff in error was thereby advised of the charge, and he has no ground to complain that his rights under the due process clause of the State or Federal Constitutions have been invaded. As the rule quoted in People *v.* Dugas, (310 Ill. 291) is limited to the crimes of murder and manslaughter, but applies generally to all offenses of a higher degree which embrace the elements of a lower crime of which the accused is convicted, there is no unconstitutional classification involved in applying the rule in this cause."

Jurisdiction.

JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

This Court has jurisdiction to review this cause because a Federal Constitutional question is distinctly raised and definitely ruled upon by the highest court of the State of Illinois adversely to the contention of the petitioner who presented the issue, and the constitutional questions there passed upon were the controlling issues before the court for its adjudication, and this Court has jurisdiction to review the judgment of the Supreme Court of Illinois and determine the jurisdiction of this Court from the record of the Supreme Court of Illinois.

State of Indiana v. *Brand,* 303 U. S. 95, 58 S. Ct., 82 L. Ed. 685, 113 A. L. R. 1482;

Commonwealth of Va. v. *Imperial Coal Sales Co.,* 293 U. S. 15;

Powell v. *Alabama,* 287 U. S. 45.

The defendant in this, a criminal case, was tried in the State court and there definitely claimed his constitutional rights were invaded and he has here presented the record of his trial so showing so as to invoke the jurisdiction of the United States Supreme Court.

In the case of *Keerl* v. *Montana,* 213 U. S. 135, 137, the Supreme Court said:

> "The defendant, during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, our jurisdiction of the writ of error cannot be questioned. Beer *v.* Massachusetts, 97 U. S. 25-30; Bohanna *v.* Nebraska, 118 U. S. 231; Boyd *v.* Thayar, 143 U. S. 135-161."

This record shows that defendant made his claim that in the trial court he was denied due process of law under the Constitution of the United States and now complains that the Supreme Court of Illinois specifically denied that claim of due process of law and it thus appears that the defendant has brought himself within its protection and within the jurisdiction of the Supreme Court of the United States.

Questions Presented.

The questions presented upon the record are:

Whether the defendant has been deprived of his liberty without due process of law under the Federal Constitutional Provision that every defendant in a criminal case has a right to have made known to him the nature and cause of the accusation against him, where the record shows an issue of murder only and fails to show any waiver of such murder issue by the prosecutor, nor any request by the defendant

for the trial of a manslaughter issue; but does show an unsolicited departure from the issue of murder by the trial judge and a finding and conviction of manslaughter.

Whether under these facts indictments for crimes which include lesser crimes are exempt from constitutional requirements, i. e., that a defendant before he can be put to trial for any crime is entitled to have made known to him the nature and cause of action against him upon which he is actually to be tried;

And whether under those facts a defendant is entitled to have notice that he is to be put to trial upon some unnamed lesser crime included in the crime charged in the indictment, which the prosecuting attorney will ask to have the jury pass upon;

And whether defendants who may be charged with crimes which include lesser crimes are unjustly, arbitrarily and unreasonably discriminated against by the holding that a defendant, when put to trial upon the major crime under a distinct charge and plea of not guilty of, say murder, may yet be gratuitously found guilty of manslaughter; and whether such procedure deprives a defendant of due process of law;

Does the holding of the Supreme Court of Illinois that the trial court may shift the issue from the specific charge in the indictment to one of the lesser crimes that may be included in the greater crime when the cause is submitted to the court upon the murder trial issue for decision deprive the defendant of his constitutional guaranty of due process of law.

Whether, under an issue of murder only, a finding of guilty of manslaughter by the trial court is made; and where the record does not show that the State has waived the murder issue; and where the record does not show that the defendant has asked that his guilt or innocence of the lesser

crime be adjudicated upon; is the finding of guilty of manslaughter responsive to the issue of murder; and is defendant deprived of due process of law by the Supreme Court of Illinois affirming a judgment upon such finding.

Whether a finding of guilty of manslaughter under an issue of murder only is a finding of not guilty generally so that defendant is entitled to his liberty.

Reasons Relied Upon for Allowance of Writ.

It is not found that the question here raised has been definitely passed upon by the Supreme Court of the United States nor by any court in the form presented.

It is thought that where strictness is the rule of decision and probabilities are not indulged in passing upon criminal records that the ruling should favor the defendant rather than the State.

The record shows that upon an issue of murder a jury was waived and the cause heard by the court as the trier of the facts and the court found defendant guilty of manslaughter, a matter not in issue and then gave judgment upon his finding; and thereby defendant contends that he has, in legal effect, been found not guilty of the charge of which he was tried and has been imprisoned for a crime, the cause or nature of which he had no notice. Defendant claims this is not due process under the Federal Constitution. He has exhausted his right of review in the courts of Illinois and has now no further haven for relief than this Court under its power to protect the defendant in his constitutional privileges.

The Supreme Court of Illinois denied to petitioner his constitutional right to have due process of law as guaranteed under the Fourteenth Amendment of the Federal Constitution and erred in so doing.

WHEREFORE it is respectfully requested that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment of the Supreme Court of the State of Illinois.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Supreme Court of the State of Illinois sought to be reviewed is reported in the Illinois Supreme Court reports as *People* v. *Lewis,* 375 Ill. 330, and is also shown in the record filed herein (R. 9-13).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended, 43 Stat. 937 28 U. S. C. A. Sec. 344 (b), and in accordance with the statements set forth in the accompanying petition for writ of certiorari under the heading of "Jurisdiction" (R. —) which statement is adopted as the statement on which jurisdiction of this Court is invoked in this brief in support of the petition for certiorari. The date of the final order of the Supreme Court of Illinois (denying rehearing) in this cause sought to be reviewed is February 12, 1941 (R. 14).

Statement of the Case.

The defendant, John W. Lewis, was indicted on May 31, 1938 by a grand jury of Cook County, Illinois. The indictment consists of two counts each charging murder and he was held without bail (R. 2-3).

Lewis was arraigned and pleaded to the indictment

> "Not guilty in manner and form as charged therein and of this he puts himself upon the country and the said People do the like" (R. 4).

The cause came on for trial on June 30, 1938, and the defendant waived trial by jury and consented that the cause might be tried before the judge as the trier of the facts.

The record of the trial shows:

> "Testimony heard in part. Age of the defendant thirty one years. Further testimony heard and the court hearing the arguments of counsel."

Ordered the cause continued till the next day. On the following day the court made its finding:

> "And the court being fully advised in the premises doth find the defendant guilty of manslaughter in manner and form as charged in the indictment"

And continued the cause till June 30, 1938 (R. 5).

On June 30, 1938, the court adjudged that,

> "The said defendant John W. Lewis is guilty of manslaughter in manner and form as charged in the indictment"

and sentenced the defendant to the Illinois State Penitentiary for a term of from one to 14 years for the crime of manslaughter (R. 5).

The record is silent as to any waiver by the prosecutor of the murder charge or of any intention of the State to rely upon any lesser crime that might exist within the charge of murder.

Nor does the record show any request by the defendant for any finding of a lesser crime than that of murder nor any cry for quarter on his part.

The cause was submitted to the trial judge upon the murder issue.

The only issue before the trial judge was guilty of murder or not guilty generally.

Writ of error was sued out upon the judgment of the Criminal Court of Cook County to the Supreme Court of Illinois for review.

Error was alleged upon the record that the finding and judgment of the Criminal Court of Cook County deprived

the defendant of his liberty without due process of law and of his right to have made known to him the nature and cause of the action against him and deprived of the right not to be compelled to give evidence against himself.

It was also assigned as error upon the record in the Supreme Court of Illinois that the finding and judgment in question were in violation of the Fourteenth Amendment of the Constitution of the United States in that they constitute a deprivation of the liberty of the defendant without due process of law; that the judgment did not respond to the issue and that the indictment was not such under either count as to sustain the finding and judgment of either court and no facts are alleged in the indictment and forming the issue upon which a finding and judgment of manslaughter could be based.

The Illinois Supreme Court affirmed the judgment of the Criminal Court and in its opinion denied the claims of the defendant that his constitutional rights under either the Constitution of the State of Illinois and that of the United States had been invaded and denied him by said finding and judgment so rendered.

The Supreme Court of Illinois which is the highest judicial tribunal of the State in which this case is cognizable denied a petition for rehearing of said cause on February 12, 1941.

Specification of Errors.

Petitioner assigns upon the record the following errors which he says the said Courts committed to his prejudice, and which he will urge in the event his petition for certiorari is allowed.

It was error to imprison defendant under the finding and judgment of the Criminal Court of Cook County, and the judgment of the Supreme Court in affirmance thereof, and such error has deprived defendant of due process of law in

violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

The finding by the trial court of guilty of manslaughter on a murder issue, was equivalent to a finding of not guilty generally, and the judgment of conviction upon that finding is void and defendant is now illegally imprisoned without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and the trial court erred in entering such judgment and the Supreme Court of Illinois erred in affirming said judgment.

The departure from the issue of murder, and conviction of manslaughter, caused defendant to be convicted of a crime the nature and cause of which was not given him as is required by the Fourteenth Amendment to the Constitution of the United States, and such action and affirmance thereof are error.

The trial court erred in departing from the issue by gratuitously finding defendant guilty of a crime for which he was not on trial and of which he had been given no notice of the cause or nature of the accusation and the Supreme Court of Illinois erred in affirming the judgment of the trial court thereby depriving defendant of the benefit of the due process provisions of the Constitution of the United States.

The classification of defendants who may be charged with crimes which have lesser crimes included in their framework, as persons who are not entitled to the protection of the due process provision of the Constitution, as to the right to be advised of the nature and cause of the accusation as to the lesser crime, is an unjust discrimination against such defendants, and the court erred in denying to defendant the right to such notice under the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

The Questions Raised Are Substantial.

IT IS THE RIGHT OF A DEFENDANT TO TRY ANY CHARGE AGAINST HIM UPON THE VERY ISSUE FORMED BY THE INDICTMENT AND HIS PLEA OF NOT GUILTY THERETO; AND WHERE THE ISSUE IS MURDER THE FINDING OR VERDICT MUST BE EITHER GUILTY OR NOT GUILTY OF MURDER. THERE CAN BE NO GRATUITOUS DEPARTURE FROM THAT ISSUE BY THE COURT OR JURY.

WHERE THE ONLY ISSUE IS MURDER A FINDING OF GUILTY OF MANSLAUGHTER IS A FINDING OF NOT GUILTY OF MURDER AND THE DEFENDANT SHOULD BE DISCHARGED FROM CUSTODY AS NOT GUILTY OF MURDER,—THE ONLY ISSUE TRIED.

THE STATE HAS THE RIGHT TO FORM AND PRESENT AS MANY ISSUES OF LESSER CRIMES UPON THE SEPARATE PROVISIONS OF THE CRIMINAL CODE AS IT MAY WISH AND COMPEL THE DEFENDANT TO TRY ALL OF THEM AS LAID; BUT IT MAY NOT INDICT FOR A GREATER CRIME AND FORCE A DEFENDANT TO TRY A LESSER CRIME UNDER THAT INDICTMENT; THE DEFENDANT MAY BY WAY OF DEFENSE SHOW A LESSER CRIME AND HAVE THE JURY SO TOLD BUT WHEN HE DOES HE VOLUNTARILY SUBMITS TO BE CONVICTED OF THE LESSER CRIME. A DEFENDANT MAY IN EFFECT CONFESS A LESSER CRIME TO ESCAPE THE GREATER BUT THE STATE CANNOT FORCE SUCH ISSUE UPON HIM, BY ANY PRESUMPTION OR ARTIFICE—THE STATE MUST, UNDER THE CONSTITUTION, ADVISE THE DEFENDANT IN ADVANCE OF THE ISSUE TO BE TRIED.

The questions raised upon this record are substantial. The gap between the issue of murder and the sentence of manslaughter in this record cannot be bridged or justified by the gratuitous action of the trial judge.

Murder and manslaughter are two distinctive crimes defined in separate sections of the Criminal Code of Illinois and carrying separate punishments. The element of malice

aforethought and deliberation distinguish murder (Rev. Stat. of Illinois, Chap. 38, Homicide, Sec. 140-155).

Homicide, Chap. 38, Par. 358, Sec. 140, Murder:

"Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart."

Murder—Chap. 38, Par. 360, Sec. 142, Punishment:

"Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court."

Manslaughter defined, Chap. 38, Par. 361, Sec. 143:

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspections."

Manslaughter—Chap. 38, Par. 363, Sec. 146, Punishment:

"Whoever is guilty of manslaughter shall be imprisoned in the penitentiary for from one to fourteen years (as amended by act approved July 6, 1927. L. 1927, p. 398)."

The rule that the charge of murder is inclusive of manslaughter only states what is apparent. But that fact does not change the fundamental principle that a defendant is entitled to know by a proper indictment with which of the two crimes he is being charged and upon which he is to be tried.

It is not the law in Illinois, or generally, that a prosecutor may create the issue of murder and then prosecute any lesser crime embraced therein as he may wish.

The true rule is that the defendant may create the issue of a lesser crime by putting in a defense which, if believed by the jury, would reduce the crime from the one charge to the lesser one and then have the jury so instructed.

But that defense is a virtual confession and plea of guilty of the lesser crime prompted by the desire rather to endure the certainty of punishment for the lesser crime than to hazard the chance of suffering that of the greater. That initiative lies with the defendant, not the State.

The State cannot force the defendant to accept an issue not tendered definitely in the indictment.

Neither the court, nor the prosecutor, nor the jury, may force the issue of a lesser crime upon a defendant simply for the reason they may believe that the greater was not proven and because they find the structure of a lesser crime in the evidence before them.

When a defendant accepts the issue of murder as charged in an indictment that is the only issue being tried, and neither the State nor its agencies can depart from it.

That such is the rule is shown by the decisions of the Supreme Court of Illinois.

In *People* v. *Lucas*, 244 Ill. 603, the indictment contained three counts, each for murder. Manslaughter was not charged. The defendant was convicted and given life imprisonment. On writ of error to the Supreme Court of

Illinois, Lucas complained as error that the trial court did not instruct the jury as to manslaughter. The court held:

> "No instruction having been asked by plaintiff in error the court had no right to assume that the plaintiff in error preferred to submit the case to the jury in such way that the jury would be compelled to find the defendants guilty of murder or not guilty. It was the right of plaintiff in error to submit that question to the jury and require the jury to pass on the question of his guilt or innocence of the crime of murder, and it was not the duty of the court to submit issues and questions to the jury in which the parties by their action said they did not desire passed upon."

In the case of *People* v. *Barkas*, 255 Ill. 516, a group of defendants were charged with the crime of murder and convicted of murder. On writ of error to the Supreme Court of Illinois, in passing upon the assigned errors, the court said:

> "Plaintiffs in error contend that if they are guilty of any crime at all they were guilty of no greater offense than that of manslaughter. This case was tried on the theory that if the defendants were guilty of any crime they were guilty of murder, and no instructions were offered by them as to the theory of the crime of manslaughter."

The court then quoted from the case of *People* v. *Lucas*, 244 Ill. 603 that:

> "It was the right of plaintiff in error to submit that question to the jury and require the jury to pass on the question of his guilt or innocence of the crime of murder."

In the case of *People* v. *Savant*, 301 Ill. 325, the indictment was for murder and the defendant was convicted and given the sentence of death. It was alleged as error that the court

had given the jury no instruction defining the crime of manslaughter. The court affirmed this death sentence and quoted from the case of *People* v. *Lucas,* 244 Ill. 603. The court also cited as authority the case of *Dunn* v. *People,* 109 Ill. 635.

In *People* v. *Funk,* 326 Ill. 57, the indictment was for robbery with a gun. The defense was alibi. The defendant was convicted of robbery with a gun and it was alleged as error that the trial court should have given a form of verdict to the jury by which defendant might have been found guilty of the lesser crime of robbery without a gun. The court there held:

> "It is not incumbent upon the court to so instruct the jury or to submit issues to the jury for which neither side asks. It was the privilege of the plaintiff in error to submit such a form of verdict if he desired to do so, not having done so, he cannot now complain."

We call attention to the case of *U. S.* v. *Wiltberger,* 18 U. S. 76, where the defendant was indicted under a United States Statute punishing crimes on water. Section 8 of that statute covered murder on the high seas and rivers, bays, etc.; Section 12 covered manslaughter on the high seas only. The defendant was indicted for manslaughter on the River Tigris in China, about 35 miles inland in fresh water.

The Court in an opinion by Chief Justice Marshall held the crimes of manslaughter and murder to be distinct crimes and the Court ordered the defendant discharged.

And may we respectfully suggest that the crime of manslaughter is as distinctive in law from murder as is robbery or any other crime. It may be related to it, but it is a distinct and different crime. It can be prosecuted under its own indictment, under its own issue and plea, and under which a defendant might defend by showing his crime to be of lesser degree and get convicted of the lesser crime;

and so on till lesser crimes run out. But every time it would be the defendant who hazarded his liberty and the State would not be the moving party.

When this record is examined it is seen that there is no suggestion upon the record that manslaughter was in contemplation in the trial of the cause. The court must be taken to have tried only the issue presented by the charge and the plea. To do otherwise is to put judicial records upon the plane of presumptions and probabilities and as said by Chief Justice Marshall in the above cited case of *U. S.* v. *Wiltberger,* 18 U. S. 76,

> "Probability is not a guide which a court in construing a penal statute can safely take."

and of course that is true as well of judicial records.

The legal effect of the court's finding was that defendant was not guilty as charged, not guilty of murder—the only issue before the court.

If the rule is good that a defendant is held to have tried a case of murder where he does not ask for quarter and does not ask to have the jury charged as to manslaughter, then the rule must be that where the record does not show that the defendant took the initiative nor that he asked for an instruction on the lesser crime the record must stand on the charge and plea as made, and that is the situation upon which this Court affirmed the death sentence in the case of *People* v. *Savant,* 301 Ill. 325, and life imprisonment in *People* v. *Lucas,* 244 Ill. 603.

In short there is nothing in this record that suggests manslaughter except the finding of the court—and that is a clear departure from the written record. This the court could only do by consent of the defendant and there is no such consent in the record.

But here we have a record in which neither the State yields or consents to reduce the grade of the crime nor the

defendant asks for quarter; but in which the court stamps its own unsolicited idea of justice upon the record. In this the court not only erred, but erred by stepping beyond the bounds of its jurisdiction to convict of a crime not in issue before it. The legal effect of its finding was to find the defendant not guilty as charged, upon which he was entitled to his liberty.

The criminal law is coded in the State of Illinois and there are no common law crimes in Illinois. In *People* v. *Corder,* 306 Ill. 264, the Supreme Court of Illinois, in dealing with an objection which would have been good at common law, affecting the indictment in that case said:

> "There is no such crime as a common law felony in Illinois. All felonies in Illinois are defined by and required to be prosecuted under the criminal code and every indictment for felony in Illinois is required to be construed in accordance with this code."

The statute provides that all trials for criminal offenses shall be conducted according to the cause of the common law except where the criminal code shall point out a different mode (Par. 736, Chap. 38, Rev. Stat. of Illinois.)

The criminal code defines murder as follows:

> "Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought either expressed or implied." (Rev. Stat. of Illinois, Chap. 38, Par. 358).

Manslaughter is defined as follows:

> "Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection." (Rev. Stat. Illinois, Chap. 38, Par. 361.)

The two different types of manslaughter, Voluntary and Involuntary, are further classified and each is defined at length in separate paragraphs of the Illinois Criminal Code (Par. 362, 363), further detailing the circumstances under which those different forms of manslaughter may be committed.

Voluntary manslaughter is defined as follows (Ill. Rev. Stat., Chap. 38, Par. 362):

> "In cases of voluntary manslaughter, there must be a serious and provoking injury inflicted upon the person killing, sufficient to excite an irrestible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

Involuntary manslaughter is defined as follows (Ill. Rev. Stat., Chap. 38, Par. 363):

> "Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

The crime of murder is punished by the Illinois Criminal Code either by death, life imprisonment, or a term not less than fourteen years in the penitentiary.

Manslaughter is punished by imprisonment in the penitentiary for from one to fourteen years (Ill. Rev. Stat., Chap. 38, Par. 360, 364), and both crimes are felonies under the code (Par. 585, Chap. 38, Rev. Stat. Ill.).

The statute requires indictments to be stated either in the terms of the statute or stated

> "so plainly that the nature of the offense may be easily understood by the jury" (Rev. Stat. of Illinois, Chap. 38, Par. 716).

The statute prescribes the form of commencement of the indictment and then states

> "(here insert the offense, and time and place of committing the same with reasonable certainty.)" (Rev. Stat. Ill., Chap. 38, Par. 716.)

Not only do the United States Constitution, and the Illinois Constitution provide that a defendant in a criminal case shall be informed of the nature and cause of the accusation against him but here the statute sets out the form and states that one of the requirements is that it shall be stated so plainly that it may be easily understood by the jury, and by the same token it serves as information to the defendant of the "nature and cause of the accusation" against him.

The indictment here is for plain murder. It is neither in the language of the statute defining the crime of manslaughter nor does it attempt to set out the circumstances or any of them so that the jury could easily understand that the defendant was on trial for the crime of manslaughter. Hence there was no attempt to inform the defendant of the nature and cause of an accusation of manslaughter, the crime of which he was convicted, a crime separate and distinct from the crime of murder, with which defendant was charged.

It is to the indictment to which a defendant looks for the

nature and cause of the accusation against him. Here there was none as to the statutory crime of manslaughter.

There is no longer any reason why persons charged with crimes that may have degrees or lesser crimes included in them should be discriminated against and held to have no right to claim the benefit of the constitutional guaranty of due process. The Criminal Code of Illinois makes the crime of murder and manslaughter two distinctive crimes with differing incidents which enables the prosecutor to prosecute them separately and the defendant should have the equal right to insist that his right to notice of the type of crime he is to defend should be observed and protected.

The failure here to observe defendant's rights deprived him of his constitutional guaranty and his imprisonment is therefore wholly illegal and the process void.

Even in civil cases the courts hold that a judgment is void when the trial court has based its judgment on issues not in the case (*Ames* v. *Holmes,* 190 Ill. 561; *Reynolds* v. *Stockton,* 140 U. S. 254.)

It is therefore respectfully suggested that the defendant was legally found not guilty by the trial court. That the liberty of defendant was thereby taken from him without due process of law and that the record is now such if defendant's contention be right the error can only be corrected by the United States Supreme Court under its appellate jurisdiction under the Constitution and laws of the United States.

The question here raised it is respectfully urged is a substantial one. It is not idle or frivolous. It is a grave question of the liberty of a citizen made to depend upon a question not found to have been passed upon by the Supreme Court of the United States directly as here raised; and a question which the Supreme Court of Illinois has decided upon a theory opposed to other decisions involving the same principle such as *People* v. *Savant,* 301 Ill. 325, and the

other cases cited above where the parties went to the jury on the charge of murder and the plea of not guilty and where the defendant has held bound by the record although he might, and he so wished, have pleaded a lesser crime as a defense and been bound by it, or had its benefit, with the consent or verdict of the jury.

Wherefore, it is respectfully suggested that the record is such that in the exercise of the discretion reposed in this Court the appeal prayed be allowed.

All of which is respectfully submitted.

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(4262)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 77

JOHN W. LEWIS, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE F. BARRETT,
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State's Attorney of Cook County, Illinois,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 1036

JOHN W. LEWIS, PETITIONER,

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The one issue presented in this Petition for Certiorari is whether a defendant is deprived of due process of law when he is found guilty of manslaughter on an indictment charging him with murder. The questions raised here are the same questions raised in the Supreme

Court of Illinois; that is, that defendant had been denied due process of law because the indictment did not specifically charge him with manslaughter.

Petitioner says that the Supreme Court of the United States has jurisdiction herein because he raised a constitutional question or, to put it more concretely, he says this court should take jurisdiction because he alleges that when he was found guilty of manslaughter on an indictment charging murder he was so deprived of due process of law that the United States Supreme Court should take jurisdiction of this cause by certiorari and, we assume, reverse the same because petitioner had been convicted of an offense without being charged therewith and of which he had no notice.

Of course this court has jurisdiction to review cases where the constitutional rights of a person have been infringed, but the whole question turns, as we have said, on whether the conviction of petitioner for manslaughter under a charge of murder infringes any right or denied him any due process of law.

It is noteworthy that the evidence upon which petitioner was convicted is not preserved in the record, and we venture to ask whether, under the indictment for murder, if the evidence showed defendant did the alleged killing in such heat of passion or under such provocation

as to reduce the offense from murder to manslaughter, the court would not have the right to find him guilty of manslaughter under the charge of murder.

In his argument, petitioner overlooks the fact that the essential thing in the indictment was the charge of a killing. It not only charged the killing but charged malice, which was an aggravated form of killing, so to speak. The indictment not only charged killing with malice but, under the authorities, charged a killing and various assaults. The main question is when the petitioner was charged in the indictment with murder whether he was informed as to the finding which might ultimately be made against him. He knew that he was charged with an assault and the slaying in question. How the slaying occurred was developed from the evidence. Undoubtedly he made his defense and gave his version as to how the slaying occurred. On the whole evidence the court found that the slaying amounted to manslaughter and not to murder.

Under all the holdings in Illinois, where a defendant is charged with murder he may be found guilty of manslaughter on the theory that we just set forth that the killing is the principal thing and that the evidence having developed the manner of killing, the court or jury should find accordingly. In *People v. Dugas,* 310 Ill.

291, at pages 299, 300, this question is discussed at some length. The Supreme Court of Illinois there said:

> "It is a general rule of the criminal law that it is sufficient to prove so much of an indictment as shows that the defendant has committed a substantive crime therein specified. (1 Chitty on Crim. Law, 250). So, where the offense charged in an indictment includes within it another offense of lower degree the defendant may be convicted of a lower offense, even though the evidence fails as to the offense of higher degree. (1st Bishop's New Crim. Law, Sec. 780; 1st Roscoe on Crim. Ev. 8th ed., 123; *Stewart* v. *State,* 5 Ohio, 145.) *Under an indictment for murder a defendant may be found guilty of manslaughter,* and the verdict is not only the conviction of manslaughter but an acquittal of the charge of murder. (*Brennan* v. *People,* 15 Ill. 511.) The general rule that when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the jury may discharge the accused of the higher crime and convict him of the lower if the evidence justifies it, finds illustration in many cases." Citing *Earl* v. *People,* 73 Ill. 329; *Howard* v. *People,* 185 Ill. 552; *Watson* v. *State,* 116 Ga. 607; *Davis* v. *State,* 39 Md. 355; *State* v. *Finney,* 13 Ida. 307.

And then the Supreme Court points out how many other offenses the defendant might be convicted of as lesser offenses under a charge of murder and cites, further,

Letcher v. *State,* 145 Ala. 669;

Thomas v. *State,* 124 Ga. 331;

State v. O'Kane, 23 Kas. 244;

Busch v. *Commonwealth,* 78 Ky. 268;

Bean v. *State*, 25 Tex. App. 346;
State v. *Scott*, 24 Vt. 127;
Commonwealth v. *Drum*, 19 Pick 479.

Petitioner intimates that common law does not prevail in Illinois. The Supreme Court of Illinois, in its opinion, disposes of this contention and points out, at page 10 of petitioner's transcript of the record that the State of Illinois has adopted the common law of England so far as it is applicable and of a general nature and that it shall be considered as in full force until repealed by legislative authority; and also that the Illinois Revised Statutes of 1939, Chap. 38, par.736, provides that all trials for criminal offenses shall be conducted according to the course of common law except when this act points out a different mode. And the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law.

There is also cited in the opinion of the Supreme Court of Illinois, 26 Am. Jur. (Homicide) Sec. 572, wherein the question of conviction for manslaughter under an indictment charging murder is discussed and conclusion is against the contention of petitioners herein.

We submit that the assertion on the part of the petitioner that the questions raised were substantial does

not in any wise aid to their substantiality. As is shown by the citations of authority, it has been almost universally held that under an indictment for murder a defendant might be found guilty of manslaughter or of lesser kindred offenses.

Petitioner himself admits that he himself might insist on being found guilty of a lesser offense; that is to say, on a charge of murder he might insist on being found guilty of manslaughter but that without his insistence this could not be done. And we assume he means it could not be done even if the evidence justified doing it. We do not deem it necessary to argue that defendant, by this contention, does away with the entire case he attempts to make in his Petition for Certiorari. In other words, if he himself may, under a murder indictment, insist on being found guilty of manslaughter, then, if the evidence justified it, the only logical conclusion from this would be that the State would have the same right. But the People need not resort to this argument to justify their position since it is in the foundation of the law that, as we have heretofore said, the killing is the principal thing; the manner in which the killing occurred, whether it amounted to murder or manslaughter or self-defense is a question of evidence for the jury or the court to pass upon.

From the above it is clearly seen that no discrimination of any kind was exercised against defendant in the court below and that he had due process of law at every step of the procedure against him.

For the reasons above given, it is respectfully submitted that the Petition for Certiorari should be denied.

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